IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

CHARLES L. PRITCHARD
Military Judge
Colonel (O-6), U.S. Army,
Respondent

and

ANDREW J. DIAL
Lieutenant Colonel, U.S. Army
Real Party in Interest

Case No. ARMY Misc. 20220001

AMICUS CURIAE PROTECT OUR DEFENDERS' BRIEF IN SUPPORT OF PETITIONER

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ISSUE PRESENTED

Whether a military judge has the jurisdiction or power to determine that a law violates the Constitution.

INTEREST OF AMICI CURIAE

Amicus curiae Protect Our Defenders is dedicated to ending rape and sexual assault in the military. It honors, supports, and gives voice to survivors of military sexual assault and sexual harassment. Protect Our Defenders works for reform to ensure survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

JURISDICTION

Amicus curiae Protect Our Defenders concurs with the Petitioner that this Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

Military courts are empowered to issue extraordinary writs under the All Writs Act." *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013) (quoting *United States v. Denedo*, 556 U.S. 904, 911 (2009). A military court may issue a writ to prevent an inferior tribunal with quasi-judicial powers from usurping judicial power and to confine it to the proper exercise of its power and authority. *United*

States v. Gross, 73 M.J. 864, 866-67 (C.A.A.F. 2014); see also *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004).

The Respondent, as discussed below in the Argument, has no power or authority to determine that Article 52 is unconstitutional. By determining Article 52 is unconstitutional, the Respondent is usurping judicial power that is not granted to him by the Constitution. This Court has jurisdiction under the All Writs Act to confine the Petitioner to the lawful exercise of his jurisdiction.

SUMMARY OF ARGUMENT

The Respondent military judge, Colonel Charles L. Pritchard, United States Army, ruled that 10 U.S.C. § 852 ("Article 52") violates the Constitution and refuses to apply Article 52 in the court-martial. The Respondent's legal rationale and the Petitioner's arguments are irrelevant and do not need to be addressed by this Court because the Respondent did not have the authority to determine the constitutionality of Article 52.

The military judge Respondent is the court-martial under R.C.M. 103(8)(B). The court-martial is a tribunal constituted by Congress under the Uniform Code of Military Justice and is within the executive branch. The court-martial is not a court ordained and established under Article III. Although its constitutional foundation as a judicial body is firmly established, a court-martial cannot determine that a law

is unconstitutional. It is emphatically the province and duty of the judicial branch to say what the law is.

The Constitution gives Congress the power to regulate and govern the armed forces and gives to the President the power and duty to command. Courts-martial cannot invalidate Congress's will or the President's responsibility to maintain good order and discipline in the armed forces.

The Respondent has no power to judge the constitutionality of Article 52, and his ruling itself is an unconstitutional usurpation that cannot stand under our Constitution.

ARGUMENT

A. No Military Court or Court Established Under Article III Has Ever Held that Article 52 Is Unconstitutional.

The Respondent held that Article 52 is unconstitutional. Respondent's Findings and Conclusions Re: Defense Motion for Appropriate Relief (Unanimous Verdict) United States Army Trial Judiciary, Fifth Judicial Circuit, Kaiserslautern, Germany, January 3, 2022) at 16.

The Respondent acknowledges that there was no precedent to find Article 52 unconstitutional in federal or military courts.[1] *Id*. at 7-8, and 11. He specifically acknowledges that the Court of Appeals for the Armed Forces ("CAAF") rejected constitutional challenges to Article 52. *Id*., citing *United States v. Bramel*, 32 M.J. 3 (C.M.A. 1990). Respondent believes he can ignore CAAF's decision because CAAF did not issue an opinion. *Id*. at 11-12.

The Respondent further acknowledges that in an unpublished opinion this Court found Article 52 to be constitutional. *Id.* at 14-15, citing *United States v. Mayo*, 2017 CCA LEXIS 239 (A.C.C.A. 2017) (unpub.). He determined this Court's reasoning in *Mayo* was not "plausible." *Id*.

The Respondent acknowledges that Congress passed Article 52 and repeatedly amended it. *Id*. at 12-16. He nevertheless determines that Article 52's non-unanimous verdicts "simply slipped into congressional legislation without much thought." *Id.* at 12. Respondent faults Congress for not offering a reason for Article 52. *Id*. at 14.

[1] Ironically, the Respondent acknowledges the Supreme Court's almost plenary deference to Congress's exercise of its Article I, Section 8, Clause 14 powers to regulate the military, but he nevertheless fails to afford any deference to Congress on Article 52. *Id*. at 3-4; citing *Solario v. United States*, 483 U.S. 435, 447 (1987).

In his ruling, the Respondent cites eight military justice cases to demonstrate that, excepting only rights to grand jury indictment and trial by jury, service members have the same constitutional rights as civilians. *Id*. at 9. Each of the cases cited by the Respondent rely upon the Constitution to interpret and fill voids left by the Uniform Code of Military Justice ("UCMJ"). *Id*.; citing *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014) (speedy trial); *United States v. Hershey*, 20 M.J. 433, 435 (CMA 1985) (public trial); *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (to be informed of the nature and cause of the accusation); *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010) (confrontation); *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) (compulsory service); *United States v. Wattenbarger*, 21 M.J. 41, 43 (CMA 1985) (counsel); *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000) (impartial panel); and *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (impartial panel).

None of the eight cases cited by the Respondent finds any statute unconstitutional. The cases simply apply the Constitution to the UCMJ and the Rules for Courts-Martial ("R.C.M."). For example, in *Weisen*, 56 M.J. at 174 the appellant alleges the military judge violated his constitutional rights because he failed to remove a potential member for cause in violation of R.C.M. 912. The constitutional right to an impartial jury is supported by the UCMJ and R.C.M., and

this case simply interpreted the law and rules in light of the Constitution. No military justice case cited by the Respondent overrules any law.

The Respondent ignores the fact that no military or federal court has ever found Article 52 unconstitutional, and he never addresses or considers the limit of his jurisdiction or powers as a military judge.

B. The Respondent Cannot Exercise the Judicial Power to Declare Laws Unconstitutional.

Military tribunals are constituted by Congress under Article I. These tribunals are Executive Branch entities. *Edmond v. United States*, 520 U.S. 651, 664 (1997). Military commanders convene courts-martial superintended by military judges (midlevel officers) who are assigned to military units and supervised by each service's Judge Advocate General. *Id.*

Courts-martial are military tribunals constituted by Congress under Article I, Section 8, Clause 9 of the Constitution and are not ordained and established under Article III of the Constitution. The Respondent does not enjoy constitutional protection of his salary and tenure.

Although military tribunals are incapable of exercising "the judicial Power" vested in Article III courts, the Supreme Court recognizes the "judicial character" of military tribunals. *Ortiz v. United* States, 138 S. Ct. 2165, 2174 (2018). The

judicial character of military tribunals gives them significant powers, including the power to adjudicate core private rights to life, liberty, and property. *Id.* at 2186 (Thomas, J., concurring) (distinguishing between "a judicial power" and "the judicial Power").

Although the Supreme Court has not drawn the line between "a judicial power" and "the judicial Power," certainly "a judicial power" cannot extend to invalidating an act passed by Congress and signed into law by the President. The Constitution assigns resolution of constitutional issues to the Judiciary. *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If a law conflicts with the Constitution, then Article III courts must determine which governs the case. "This is of the *very essence of judicial duty*." *Id.* at 178 (emphasis added).

Judging the constitutionality of an Act of Congress is the "gravest and most delicate duty" the Supreme Court is called on to perform. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Congress is a branch of government that is equal to this Court, and its elected members take the same oath to uphold the Constitution as the members of this Court. *Id.* The Supreme Court accords more than the customary

deference accorded the judgments of Congress where the case arises in the context of national defense and military affairs. *Rostker*, 453 U.S. at 486.

A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving*, 517 U.S. at 757. Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). The judicial Power cannot be shared with another branch of the government. *Stern v. Marshall*, 564 U.S. at 483. "There is no liberty if the power of judging be not separated from the legislative and executive powers." *Id.* (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

While the three branches are not hermetically sealed and (as discussed above) the judicial character of military tribunals gives them significant powers to adjudicate rights to life, liberty, and property; it remains that Article III imposes limits that cannot be transgressed. *Stern*, 564 U.S. at 483. Article III could not preserve the system of checks and balances or the integrity of judicial decision making if entities outside of Article III exercised the judicial Power. *Id.* at 484. The Constitution assigns resolution of constitutional law to the Judiciary. *Id.*

Although military tribunals have developed expertise in military law, they do not have expertise in constitutional law. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969), *overruled on other grounds by Solorio v. United States*, 483 U.S. 435 (1987) ("courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law"). The "experts" in constitutional law are the Article III courts. Judging the constitutionality of congressional acts is the prototypical exercise of judicial Power, and if this right is given to military tribunals, then "Article III would be transformed from the guardian of individual liberty and separation of powers the [Supreme] Court has long recognized into mere wishful thinking." *Stern*, 564 U.S. at 495.

The Respondent's determination that Article 52 is unconstitutional infringes upon the Supreme Court's gravest and most delicate duty and violates the separation of powers principle. The Constitution forbids the Respondent or any other Article I tribunal from exercising this great judicial Power.

To be clear, the amicus curiae Protect Our Defenders does not suggest that the Respondent and other Article I tribunals must or should ignore the Constitution. When interpreting statutes and rules, tribunals should interpret any ambiguity or gap in accordance with the Constitution. Where there is no ambiguity, courts-martials and other tribunals must apply the laws or rules as

written and are forbidden from overruling Congress. The Respondent, as mid-level officer of the Executive Branch, simply does not have the authority to tell Congress it acted unconstitutionally any more than he has the power to tell the Supreme Court that it has acted unconstitutionally.

The Real Party in Interest is not without a remedy for constitutional violations. Although military tribunals cannot provide relief, the Real Party in Interest may seek redress in civilian courts for constitutional wrongs suffered in the course of military service. *Chappell*, 462 U.S. at 304-05. The Real Party in Interest must appeal to an Article III court that has the judicial Power to judge the constitutionality of laws and rules.

C. As an Article I Tribunal, This Court Does Not Have the Power to Declare Article 52 Unconstitutional.

Just as the Respondent does not have the power to declare Article 52 unconstitutional, this Court is also an Article I tribunal that cannot find unconstitutionality of a law. The Court has the power to consider and rule upon constitutional issues, and the power to interpret the laws and rules so that the laws and rules are constitutional. Where the statute is clear and unambiguous, as Article 52 is, the Court's sole role is to apply it as written. *EV v. United States*, 75 M.J. 331, 333-34 (C.A.A.F. 2016) (when a statute's language is plain, the sole function of the courts is to enforce it according to its terms).

CONCLUSION

Because the Petitioner Colonel Pritchard has no power to judge the constitutionality of laws, his ruling that Article 52 is unconstitutional is outside of his jurisdiction and usurps the judicial Power vested in Article III courts. This Court should constrain the Respondent to his lawful authority and issue a writ ordering him to apply Article 52 as it is written.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 3, 2022 a copy of the foregoing was transmitted by electronic means to the following:

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